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Supreme Court, U.S.
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No. 29

In the Supreme Court of the United States

OCTOBER TERM, 1947

FEDERAL TRADE COMMISSION, *Petitioner*

vs.

NORTHWESTERN PORTLAND CEMENT COMPANY, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR REHEARING

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THE ARGUS PRESS SEATTLE

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INDEX

	Page
Introduction	1
Grounds for this Petition for Rehearing	2
Argument in Support of Petition	3
I. There is no evidence in support of the factual basis for this court's holding that the Federal Trade Commission has jurisdiction over Northwestern Portland in view of the finding that it does not sell or ship cement outside the State of Washington	3
II. The record is devoid of any evidence to support any findings against Northwestern Portland	4
III. Unless the Order of the Commission is clarified or changed, Northwestern Portland cannot determine what mode of operation will be deemed legal by the Federal Trade Commission and it will find itself in an impossible position	5
Certificate	8

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR REHEARING

Northwestern Portland Cement Company herewith respectfully files its petition for a rehearing of the above-entitled cause and for a clarification of the Order of the Federal Trade Commission.

Although Northwestern Portland has maintained its separate appearance throughout these proceedings, the voluminous record and the many contentions have served to make difficult an appreciation of the facts concerning this respondent and its unique situation. An analysis of the facts reveals plainly that Northwestern Portland should never have been joined in these proceedings, and this is a final plea for a reexamination of the facts affecting this particular respondent in the hope that its position will thus

become clear. It is also a plea that the Order of the Federal Trade Commission be clarified so that this respondent may be enabled to determine how it may lawfully operate under the Order.

It is this respondent's understanding that the other respondents in these connected cases are filing Petitions for Rehearing on the general grounds affecting substantially all respondents. Northwestern Portland adopts and relies upon these other petitions without burdening this court by repeating herein such broad contentions.

GROUNDS FOR THIS PETITION FOR REHEARING

The following are the grounds for this Petition:

I. There is no evidence in support of the factual basis for this court's holding that the Federal Trade Commission has jurisdiction over Northwestern Portland in view of the finding that it does not sell or ship cement outside the State of Washington.

II. The record is devoid of any evidence to support any findings against Northwestern Portland.

III. Unless the Order of the Commission is clarified or changed, Northwestern Portland cannot determine what mode of operation will be deemed legal by the Federal Trade Commission and it will find itself in an impossible situation.

ARGUMENT IN SUPPORT OF PETITION

I.

There is no evidence in support of the factual basis for this court's holding that the Federal Trade Commission has jurisdiction over Northwestern Portland in view of the finding that it does not sell or ship cement outside the State of Washington.

This court, in its opinion, held that the fact that Northwestern Portland did not sell or ship cement outside the State of Washington is not controlling in determining the Commission's jurisdiction under the Federal Trade Commission Act because "the charge was, as supported by the Commission's findings, that these respondents in combination with others agreed to maintain a delivered price system in order to eliminate price competition in the sale of cement in interstate commerce." It would seem a complete answer for Northwestern Portland again to point out that the uncontradicted record is crystal clear that this respondent, single handedly, as a means of competition, adopted the delivered price method of selling at a time when its only competitors were selling on an f.o.b. mill basis.

We have, without avail, challenged counsel for the Commission at every step in these lengthy proceedings to point to a line in the evidence which indicates that the basis, manner, or purpose of Northwestern Portland's use of the delivered price method of selling has changed since the very day it was first adopted by this respondent. Also, the record is replete with uncontradicted evidence that, when requested

by the Government, this respondent made f.o.b. mill bids which were non-identical with the bids of its competitors.

II.

The record is devoid of any evidence to support any findings against Northwestern Portland.

Our brief notes the specific portions of the record which establish beyond peradventure that there is no evidence to support any findings against Northwestern Portland. It is noteworthy that no references made to the record in any of the Commission's briefs filed in these proceedings support the Commission's claim that there is such evidence, other than the fact of bare membership in the Cement Institute for a period of time. We respectfully urge that that fact standing alone is not sufficient basis for a finding that this respondent was a party to any alleged combination or conspiracy.

When one turns to the essential grounds for a finding against this respondent, to-wit, use of freight rate books, refusal to sell f.o.b. mill to government agencies, involuntary or punitive bases, refusal to allow truck transportation, refusal to permit diversion in transit, standardization of terms of sale, classification of dealer business, and boycott of dealers handling imported cement, there is no evidence to connect this respondent with those charges. If there were any evidence in the record, able counsel for the Commission would long since have called it to the attention of the court, particularly in the face of repeated requests by this respondent that they do so.

III.

Unless the Order of the Commission is clarified or changed, Northwestern Portland cannot determine what mode of operation will be deemed legal by the Federal Trade Commission and it will find itself in an impossible situation.

Northwestern Portland's mill is located on the westerly slope of the Cascade Mountains at Grotto, Washington, some eighty miles northeast of Seattle. The principal marketing area in western Washington is, of course, the City of Seattle. There is one cement mill presently located in Seattle. If Northwestern Portland wishes to sell cement in Seattle, and it must do so to survive, it will have to meet the price of the company whose mill is located there. That will also be true of any other mill which wishes to sell in Seattle. Because of the freight from Grotto to Seattle it is obvious that Northwestern Portland's "mill net" must be less than the Seattle company's and that its mill net in Seattle will be less than its mill net in other markets, small as they may be, where it has a freight advantage.

The Commission has contended throughout that identity of prices at given destinations constitutes evidence from which an inference of conspiracy may be drawn. Yet, under the Robinson-Patman Act, Northwestern Portland is permitted to make a price reduction where it is "made in good faith to meet an equally low price of a competitor." The Robinson-Patman Act permits it; it must be done by Northwestern Portland if it is going to sell in the principal

market in its area; and yet, if it does this very thing which the law permits and which it must do if it is to survive, it will be doing that from which the Commission inferred an unlawful combination or conspiracy.

We should like to call the court's attention to another peculiar problem facing Northwestern Portland and its competitors in this area. The Federal Government is about to commence the construction of several large dams across the Columbia River in eastern Washington. Much cement will be required for the construction of these dams and for the other uses required in the large hydro-electric and reclamation projects which are definitely planned. Cement will be sold in many places and at many points in eastern Washington that are now mere barren desert. Northwestern Portland will, of necessity, have to determine upon a price, and in doing so will have to take into consideration the price at which mills with freight advantages will be able to sell cement for delivery at these destinations. No doubt Northwestern Portland would not be able to compete by quoting its regular mill net.

Thus, under the position taken by the Commission, Northwestern Portland subjects itself to a charge of price discrimination. Once more, the situation appears from which the Commission has already drawn an inference of combination although, as must be evident to the court, there is no other way in which respondent can sell in the new territory referred to.

The Order of the Commission should be clarified. It is not only to the advantage of this respondent, but definitely in the public interest that this be done.

It is therefore submitted that a rehearing should be granted and that, in any event, the Order of the Federal Trade Commission should be clarified.

Respectfully submitted,

S. HAROLD SHEFELMAN
Attorney for Northwestern Portland Cement Company

CERTIFICATE OF GOOD FAITH

I, S. HAROLD SHEFELMAN, the attorney for Northwestern Portland Cement Company, in the foregoing cause, do hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

Seattle, Washington, May 21, 1948.

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S. HAROLD SHEFELMAN